presentation of particular types of programming.[45] For example, it has stated:

> The Commission will not dictate the issues and sub-issues that licensees must address...In keeping with decisions eliminating quantitative guidelines, we do not intend to delineate the amount of issue-responsive programming that would be *de minimis* in any case.[46]

Similarly, it also noted:

> Licensees have broad discretion to choose, in good faith, the issues the licensee believes to be of concern to the community and the best way to address those issues...Pursuant to this broad discretion, which is rooted in the right to free speech, the Commission does not require licensees to present any specific quantity of overall issue-responsive programming, to address any particular topic, or to cover every aspect of a topic addressed.[47]

Indeed, in eliminating its quantitative "news, public affairs and all other" programming guidelines, it recognized both the constitutional pitfalls and the lack of effectiveness of specific program standards:

> We find that the present regulatory structure raises potential First Amendment concerns. Congress intended private broadcasting to develop with the widest journalistic freedom consistent with its public interest obligation.

45/ See, e.g., Standards for Substantial Program Service, 66 FCC 2d 419 (1977), aff'd sub nom., National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978); Memorandum Opinion and Order, BC Docket No. 79-219, 87 FCC 2d 797, 809, 819 (1981), aff'd sub nom., Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

46/ In re License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania, Memorandum Opinion and Order, FCC 90-158, 5 FCC Rcd 3847, 3851 at no. 8 and 10 (1990) [citations omitted].

47/ In re License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania, Memorandum Opinion and Order, DA 93-1035, 8 FCC Rcd 6400, 6401 (1993), citing Philadelphia Television Stations, 5 FCC Rcd at 3847-48.

> Moreover, the public interest standard necessarily invites reference to First Amendment principles. These concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance.[48/]

Of particular relevance here, these First Amendment concerns have controlled the FCC's prior refusal to adopt quantitative children's programming regulations. In its 1974 Children's Television Report, for example, it stated:

> While the Commission's statutory authority is indeed broad, it is certainly not unlimited. Broadcasting is plainly a medium which is entitled to First Amendment protection. Although the unique nature of the broadcasting medium may justify some differences in the First Amendment standard applied to it, it is clear that any regulation of programming must be reconciled with free speech considerations...For these reasons, the Commission historically has exercised caution in approaching the regulation of programming.[49/]

In denying reconsideration of that decision, it reiterated its constitutional concerns:

> It has been our policy decision to avoid rules which would specify numbers of hours to be devoted to children's programming; rather we have sought to encourage licensee responsibility and industry self-regulation. In our view, the adoption of rules would involve the government too deeply in program content questions, which raise serious constitutional problems. Second, we have sought to encourage the licensee to determine the needs and interests of his child audience and to program to serve that audience. Third, because the considerations as to what constitutes a

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48/ The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, 98 FCC 2d 1076, 1089 (1984) [citations omitted].

49/ Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, Children's Television Report and Policy Statement, Docket No. 19142, 50 FCC 2d 1, 3 (1974) [citations omitted].

> "reasonable amount" may vary, according to service area demographics, existing children's programming, market size, network affiliation or independent status, prior commitments to locally-produced programs, and the availability of talent, etc., we believe it is desirable to avoid rules which are unnecessarily broad and inflexible.[50/]

The Commission emphasized again in 1984 its unwillingness to adopt mandatory children's programming obligations:

> Program quota systems have been viewed historically as fundamentally in conflict with the statutory scheme of broadcasting regulation...calls for programming requirements or quotas of one type or another have been repeatedly been rejected. Their rejection at times in the past when only a small percentage of the stations now in operation had been licensed, raises significant questions as to how a change in the basic answer could now be justified...Numerous judicial opinions have also noted that serious First Amendment concerns are raised by such requirements.[51/]

Reflecting the same First Amendment concerns with quantitative children's programming processing guidelines, Congress expressly disavowed the need for CTA program standards:

> The Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review pursuant to this Section or any section of this legislation.[52/]
>
> The legislation does not require the FCC to set quantitative guidelines for educational programming, but, instead,

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50/ Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, Memorandum Opinion and Order, Docket No. 19142, 55 FCC 2d 691, 693 (1975).

51/ In the Matter of Children's Television Programming and Advertising Practices, Docket No. 19142, 96 FCC 2d 634, 651-52 (1984).

52/ Senate Report at 23; House Report at 17; 136 Cong. Rec. S10122 (daily ed. July 19, 1990)(Remarks of Mr. Inouye).

> requires the Commission to base its decisions upon an evaluation of a station's overall service to children.[53/]

Congress thus could not have made it clearer that the Commission was not to adopt any form of quantitative programming requirements.

Congress and the Commission itself have thus repeatedly and expressly recognized that the First Amendment clearly bars Commission dictation of the amount and type of programming which licensees must air to satisfy the CTA. As a court has said, "The right to the free exercise of programming discretion is, for private licensees, not only statutorily conferred but also constitutionally protected."[54/] Yet the Commission proposes to abandon its constitutionally-mandated restraint in favor of what are in practical effect content-based program quotas. This action cannot satisfy the requirement that governmentally-imposed restrictions on speech be narrowly tailored to further a substantial governmental interest.[55/]

Initially, it should be noted that the Commission's proposals are not narrowly tailored. Rather, the specificity of

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53/ 136 Cong. Rec. H8537 (daily ed. October 1, 1990)(remarks of Mr. Markey).

54/ Muir v. Alabama Educational Television Commission, 688 F.2d 1033, 1041 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983), citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

55/ FCC v. League of Women Voters, 468 U.S. 364, 380 (1984); United States v. O'Brien, 391 U.S. 367, 376 (1968). See also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); CBS, Inc. v. FCC, 453 U.S. 367 (1981).

the proposed quantitative requirements has precisely the contrary effect: the more specific the standards, the greater the intrusion on licensees' programming decisions -- and the more offensive to the First Amendment.

Nor do the proposed program quotas satisfy the requirement that they serve an important governmental interest. The Commission itself notes that it has insufficient information upon which to premise its regulations: "evidence is insufficient to support a conclusion as to whether or not the educational and informational needs of children are being met...In particular, none of the studies submitted enables us to determine accurately what amount of programming specifically designed to educate and inform children is currently being aired by commercial stations."[56/] The First Amendment clearly does not countenance speech-based restrictions where, as here, their factual premise is admittedly unsupported.

Nonetheless, the Commission cites Action for Children's Television v. FCC, 852 F.2d 1332, 1343, n. 18 (D.C. Cir. 1988) ["ACT"] for the proposition that there is a compelling governmental interest in safeguarding the physical and psychological well-being of a minor. ACT is inapposite, however, because the issue in that case was whether the government could impose restraints on broadcasters intended to prevent the exposure of children to indecent material. Here, the issue is not whether the Commission may protect children, but whether it

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56/ Notice at ¶ 17.

may compel broadcasters to attempt to educate children through a speech mandate that dictates the content, length and scheduling of a narrowly-defined category of programming. Those are two very different issues.

Similarly, a court's prior approval of a general licensee obligation to serve children[57/] does not support adoption of the specific program quotas contemplated here. Even assuming that the scarcity-based premise for detailed broadcast regulation remains valid,[58/] a general requirement that licensees serve children through their programming is a far cry from specific quotas for particular program content. A governmental interest in protecting children provides a different base for different types of regulation than the governmental interest in educating children offered as the basis for the regulations under consideration here.

Not only would the proposed program quotas fail to serve an important governmental interest: they would disserve a broader and long-recognized governmental interest. Television deregulation and the growth in the number of television stations

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57/ Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

58/ There is growing judicial questioning of the continuing validity of the scarcity assumptions underlying Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)'s approval of broadcast regulation. See, e.g., Telecommunications Research and Action Ctr. v. FCC, 801 F2d 501, 508-509 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987); Arlamsas AFL-CIO v. FCC, 11 F.3d 1430 (8th Cir. 1993) (Arnold, J., concurring); Forbes v. Arkansas Educational Television Communication Network Foundation, 22 F.3d 1423, 1431 (8th Cir. 1994) (McMillian, J., concurring in part and dissenting in part), cert. denied, 115 S.Ct. 1962 (1995).

have permitted an increase in the presentation of local news and information programming. This development -- consistent with stations' established general obligation to provide programming responsive to community issues -- could be reversed if stations must begin to devote specific time periods to children's educational and informational programming.

As a practical matter, it is likely that many stations will air children's programming in several time periods: early mornings, Monday - Friday; early fringe, Monday - Friday; and mornings, Saturday and Sunday. Unfortunately, stations, particularly network affiliates, use this time for other purposes, largely for news and information programming.[59/] If the amount of children's programming has to be increased as the result of government fiat, this will occur at the expense of the news and informational programming now aired in these time periods. In other words, the FCC would, as a practical matter, be sacrificing local news and information programming to require the broadcast of children's programming, much of which will not be locally-produced. There is no governmental interest in this result.

In sum, the Commission's proposal for establishment of children's programming quotas -- whether labeled program standards or programming guidelines -- cannot withstand First Amendment review. The Commission's current CTA-based programming

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59/ Many stations, for example, have added Saturday and Sunday local news programs. Others have added substantial local news in early morning and early fringe weekday hours.

requirements push the envelope of permissible governmental programming regulation. The agency should not exceed that envelope by adopting its current requirements.

Program Sponsorship Would Create Cost and Public Interest Disparities Within Markets

The Commission, finally, proposes to adopt "program sponsorship" rules that would allow licensees to partially meet quantitative programming requirements by financing or otherwise supporting children's programming on other stations in the same market.[60/] The Joint Parties submit that any quantitative programming requirements adopted herein should be consistently applied to all stations, regardless of size. Allowing stations to satisfy quantitative programming obligations, even in part, through sponsorship would create disparities among stations with respect to the costs and public interest impact of compliance. All stations should be held to the same standard. The Commission should not adopt new program sponsorship rules.

Conclusion

The underlying issue in this proceeding is whether any additional CTA-based regulation is needed. The Joint Parties submit that it is not. Information to be submitted by other parties in this proceeding demonstrates that the television industry has responded to Congress' call to improve the quality

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60/ Notice at ¶ 77.

and quantity of children's educational and informational programming. The Joint Parties, for example, have added substantial children's educational/informational programming to their program schedules and have continued to air general audience programming which serves children's educational and informational needs. Other stations have done so as well.

The Commission is not authorized to engage in social engineering. Yet that is precisely what its proposals entail. The CTA does not require, and the First Amendment does not permit, the type of detailed, content-based regulation associated with the Commission's proposed specific programming requirements. The Communications Act does not permit the intrusion into licensees' private business decisions associated with the Commission's proposed specific operational requirements. There is, in short, no authority for the Commission's proposals.

The Joint Parties agree with the Commission that providing educational and informational programming for the nation's children is a significant objective. But licensees must be free

from governmental interference in satisfying this objective. The Notice's proposals should not be adopted.

Respectfully submitted,

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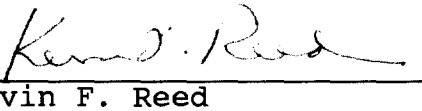
By 
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